

TITLE 329 SOLID WASTE MANAGEMENT BOARD
LSA #05-181(SWMB)

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from September 27, 2006, through October 27, 2006, on IDEM's draft rule language. IDEM received comments from the following party:

Robert Snodgrass, LFR (LFR)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: Introduction to rulemaking: The proposed rulemaking does not "include the new exclusion under the hazardous waste rule at 40 CFR 260 et al." at all. The US EPA rule published on July 28, 2006 states at 40 CFR 261.4(a)(22)(I) that used, intact cathode ray tubes (CRTs) "...are not solid wastes within the United States unless they are disposed or they are speculatively accumulated...". It goes on to state under 40 CFR 261.4(a)(22)(iii) and (iv) that used, broken CRTs and glass removed from CRTs are not solid waste provided certain very minimal requirements are met.

IDEM's proposed rulemaking not only fails to include the new Federal exclusion, it directly contradicts it by continuing to regulate all CRTs as solid waste even when they are managed in full compliance with the provisions under which the US EPA would exclude them. Furthermore, while the US EPA does believe it is necessary to place minimal requirement on the processing of broken CRTs, the US EPA did not believe it was necessary to place any requirements on other used electronics that are being recycled.

We respectfully request IDEM to revise this rulemaking to fully comply with the July 28, 2006 Federal rulemaking. (LFR)

Response: This rulemaking is much broader than the federal CRT rule. This rule covers the whole universe of electronic waste. However, IDEM is proposing to adopt the CRT exclusion in the hazardous waste rules at 329 IAC 3.1. This will make the rule consistent with federal hazardous waste rules and let Indiana be able to regulate CRTs under this rule. CRTs are only excluded from being a solid waste under the federal hazardous waste rules at 40 CFR 261.1(b)(1). All references to "solid waste" in 40 CFR 260 et al. are only applicable to the two-step process of waste determination in the hazardous waste rules at 40 CFR 261.2 through 40 CFR 261.3. CRTs remain a solid waste under both federal law and Indiana law by the definition at IC 13-11-2-205(a) and are still subject accordingly to Indiana's environmental management laws and associated regulations.

The department, prior to the beginning of this rulemaking, presented an informational "white paper" on electronic waste detailing studies done on the environmental hazards of electronic waste components. The United States Environmental Protection Agency (EPA) has contracted with the University of Florida (Dr. Timothy Townsend) for several studies regarding the health and environmental risks associated with electronic waste. This information was also presented at the first workgroup meeting.

Comment: NIFL elements: IDEM has failed to identify that most of the storage requirements they propose are not imposed by the Federal rule. The only storage requirements imposed by the Federal rule are found at 40 CFR 261.39(a)(1), (a)(2) and (b)(1), and those only apply to broken CRTs. Therefore, all storage requirements beyond being in a building with roof, floor and walls or storage in an appropriate, labeled container are in excess of the Federal requirements. And again, the Federal requirements only apply to broken CRTs.

The only operational requirements imposed by the Federal rule are found at 40 CFR 261.39 (b)(2)(I) and (b)(2)(ii), and those only apply to broken CRTs. Therefore, all operational requirements beyond processing in a building with roof, floor and walls and a restriction against the volatilization of lead are in excess of the Federal requirements. And again, the Federal requirements only apply to broken CRTs.

Finally, the employee training requirements proposed in this rulemaking are not imposed by any Federal environmental law. Facilities may be subject to OSHA requirements, but those are beyond the scope of IDEM's authority under IC 13-14-2. (LFR)

Response: Indiana state laws and regulations have long included requirements not found in Federal statute or regulations; the lack of regulation at the Federal level does not preclude Indiana from initiating regulatory programs when needed. IC 13-14-2 concerns IDEM's legal authority for court proceedings and orders, compliance inspections, and representation in compacts and conferences, not rulemaking. Instead, IDEM is authorized to propose new rules to the various environmental boards at IC 13-14-8-1. The state rule can be broader in scope, and IDEM does want to provide citizens and the environment with a safety factor regarding the storage, processing and disposal of electronic waste. Much of this waste has been proven through scientific studies to be a hazardous waste.

Under the current rules, CRTs and e-waste are still solid wastes and, if processing, the processing facility would still be required to be permitted for processing under the solid waste processing facility rule. This rule will allow storage and processing under an e-waste rule that is more reasonable and less burdensome.

Employee training is not only an OSHA requirement. The department has the authority to require training and does so for several programs.

Comment: NIFL element-environmental hazard: This assertion is directly contradicted by the July 28, 2006 Federal rule that exempts CRTs destined for recycling from the definition of solid waste, and therefore from even the possibility of being hazardous waste, provided certain minimal standards are met. And the minimal standards only apply to broken CRTs, not to intact CRTs and certainly not to all other types of used electronics being managed in legitimate recycling systems. Additionally, IDEM repeatedly stated during the workgroup meetings that "e-waste" facilities currently operating within the state had not caused serious problems. (LFR)

Response: As noted above, CRTs remain a solid waste under the Indiana statutory definition at IC 13-11-2-205(a) and are subject to applicable Indiana laws and regulations.

Indiana is proposing consistent rules for all e-waste. All facilities processing electronic waste will be required to meet the same standards. The industry wants a level playing field and to know exactly what is expected of the facilities that store and process e-waste.

Comment: NIFL elements-fiscal impact: Please see the above comments regarding which of these proposed requirements actually are required under Federal law. There are significant additional requirements that go well beyond the Federal requirements and common business practices and a detailed analysis should be conducted into the estimated fiscal impact of these requirements.

While it is true that IDEM is not proposing a registration fee, but that is not the same as saying “There will not be cost for registration.” If IDEM were requesting all e-waste processors to simply provide notice of where they were located and provide a brief narrative of their operation, then it might be possible to state the cost is insignificant. However, there will be a significant amount of effort required to supply all the details specified in the proposed rule at 329 IAC 16-5-1(f) and there will be a cost associated with that effort.

We respectfully request IDEM to review the need for this rulemaking based on current operations and/or environmental impact data relevant to Indiana. If they still decide it is necessary to implement a rule, we respectfully request IDEM revise the proposed language to make it compatible with the Federal CRT rule and to either eliminate any requirement that is more stringent than applicable Federal environmental requirements and conduct a complete and thorough fiscal impact analysis as required by state law before resubmitting the rule for Board review. (LFR)

Response: The legal position of EPA is that e-waste that is not a household hazardous waste or a conditionally exempt small quantity generator hazardous waste (CESQG), and if “characteristically” hazardous must be fully regulated as a hazardous waste. That is why EPA wrote an exclusion for CRTs; however, EPA did not address all e-waste and this rule fills the void in a manner consistent with the approach of the federal CRT rule. By excluding CRTs from federal hazardous waste rules, states have more flexibility to regulate under the less stringent solid waste rules.

If an e-waste processing business is being correctly managed, it will already have all the required information and will only need to provide it to IDEM in the format required. Facilities can do this easily without the expense of hiring a consultant.

IDEM believes that a complete fiscal analysis of the draft rule was done. A fiscal impact analysis is conducted as part of any rulemaking.

Comment: Potential fiscal impact: IDEM states “There is no cost associated with sending in a registration form”, but the proposed requirements in 329 IAC 16-5-1(f) go well beyond simply filing a form. And while “sending in” a registration may have almost no cost associated with it, the preparation of the “form” as specified in 329 IAC 16-5-1(f) will be very involved and take considerable time and effort and there will be a significant cost associated with that time and effort.

IDEM states “The United States Environmental Protection Agency estimates that the average savings under the 2006 CRT rule for a previously regulated small quantity generator is \$520 per year; for a previously regulated large quantity generator, the

average saving is \$1,091 per year.” However, as was discussed above, the 2006 Federal CRT rule is significantly simpler than the proposed IDEM rule and in fact completely eliminates most of the requirements proposed in this rule. (Not including the requirements for exporting CRTs, the Federal requirements for managing intact and broken CRTs, including definitions, take up less than 3 columns/1page in the Federal Register.)

We respectfully request IDEM to revise this rule to make it compatible with the Federal CRT rule and to either eliminate any requirement that is more stringent than an applicable Federal environmental requirement or conduct a complete and thorough fiscal impact analysis as required by state law.

In response to a comment from the Goldsmith Group, Inc regarding potential fiscal impact, IDEM states in part: “Registering with the department will cost nothing.” However, see the above comments regarding submitting a simple notification of location and activities versus what is actually proposed in 329 IAC 16-5. The proposed language is similar to what is required to be submitted to apply for a solid waste processing facility permit (329 IAC 11-9-2), and there are considerable costs associated with preparing such a submission. Even if there is no fee for submitting the e-waste registration application, the costs for preparing it must still be considered.

We respectfully request IDEM conduct a complete and thorough fiscal impact analysis as required by state law. (LFR)

Response: IDEM’s comment was relative to there not being a fee for registration under this rule. There may be some minimal cost to filling out the registration.

This rule is taking a different approach from the federal CRT rule. This rule is regulating all e-waste and trying to identify storage and processing facilities to ensure the facilities manage e-waste properly.

IDEM believes that a complete fiscal analysis of the draft rule was done. A fiscal impact analysis is conducted as part of any rulemaking.

Comment: 329 IAC 16-1-1(b) The July 28, 2006 Federal rule specifically excludes CRTs destined for recycling from the definition of solid waste, and other used electronics being processed for recycling have similarly been considered exempt from the definition of solid waste as they possess real value in the form of recoverable metal and plastic. Therefore the primary purpose of this proposed regulation seems to be mute. Additionally there are already open dumping and storm water regulations in place that regulate the activities being proposed for additional regulation here.

Given materials being legitimately recycled are not solid waste and IDEM already has adequate means to regulate activities that threaten human health and the environment, we respectfully request IDEM re-evaluate the need for this regulation. (LFR)

Response: Under IDEM’s current rules, an e-waste processing facility may be considered a solid waste processing facility requiring a solid waste processing facility permit under 329 IAC 11. The rapid increase of e-waste processing that led to the recent Federal rule changes has also led Indiana to re-evaluate its oversight of e-waste processing. But instead of using the existing option of requiring a solid waste processing facility permit, IDEM has instead proposed draft rules that will allow facilities to avoid the costly alternative of a permit under 329 IAC 11.

CRTs are only excluded from being a solid waste under the hazardous waste rules and this exclusion includes making a hazardous waste determination as provided for in the hazardous waste rules at 329 IAC 3.1.

This rule is needed because it provides a higher level of protection for human health and the environment than is provided by existing open dumping and storm water rules.

Comment: 329 IAC 16-2-12, 14, and 17 Under these definitions, e-waste would include everything from a table lamp, to tennis shoes that light up when you walk, to a greeting card with an LED, etc. These definitions are far too broad given IDEM has failed to document a single example of any of these items posing a risk to human health or the environment and that is not already covered by existing regulations.

We respectfully request IDEM withdraw this rulemaking until they can adequately define the items that actually pose an unregulated risk, taking into account the July 28, 2006 Federal CRT rule. (LFR)

Response: This a one-stop shopping rule, as requested by the external rule workgroup. If a facility suddenly collects more than 46,000 pounds of any of the waste articles mentioned, it should be regulated under this rule or the solid waste processing facility permitting rules. There is an exclusion at 329 IAC 16-3-1(8) for incidental amounts of e-waste mixed in with larger volumes of recyclables. In addition, while the definition is comprehensive, the e-waste rules are meant to be comprehensive in scope. The de minimis exclusion accounts for small amounts of e-waste collected and processed. The regulated community wanted an inclusive definition to avoid hairsplitting, narrow distinctions about what would be regulated in the rule and what would not.

IDEM has provided sufficient documentation of the hazards of e-waste and the hazards of improperly managed e-waste to the solid waste management board and to the public at the workgroup meetings.

Comment: 329 IAC 16-2-40 and 329 IAC 16-5-1(h) IDEM added the phrase “and the approval by” to the definition in 329 IAC 16-2-40 of “registration” following the workgroup meetings. This effectively makes the registration a permit application, which we believe goes beyond the intent originally published in the notification of rulemaking. This attempt to require a new form of permit not mandated by federal regulation (and in fact specifically exempted by the 2006 CRT Rule) or by the state legislation is made even clearer by the language in 329 IAC 16-5-1(h) which allows the commissioner to deny or place additional conditions on a registration. It seems contradictory for the state to be requiring a permit for activities that the federal regulators have eliminated from regulation completely.

We respectfully request IDEM re-evaluate the need for this regulatory program. If a program is needed, we request IDEM consider changing the registration to a simple notification with reduced submission requirements. (LFR)

Response: A registration can certainly include conditions or be denied by the commissioner as circumstances warrant. A decision by the EPA to remove CRTs from hazardous waste regulation does not constitute a decision that regulation of CRTs by states as a solid waste is not warranted. Indiana may establish statutory and

environmental requirements beyond those found in Federal laws and rules. Indiana's confined feeding program, originally established in 1973, preceded Federal involvement with concentrated animal feeding operations (CAFOs) by over 2 decades. These regulations were appropriate and necessary in a state with extensive confined animal feeding operations, as compared to a state like New Mexico that does not have many such operations.

Registration programs have significant precedent, as found in the waste tire storage registration program established under IAC 13-20-13 and the vegetative matter composting registration program under IC 13-20-10, and provide a cost-effective alternative to obtaining a solid waste processing facility permit.

Comment: 329 IAC 16-3-1 There is no *de minimis* exclusion for outside storage. As written this would require a facility that stores recycled paper on an open shipping dock to become registered if there is a single musical greeting card in a bale of paper. With the overly broad definition of e-waste in this proposed rule, an obsolete fifty-ton pneumatic press with a single electronic gauge would have to be stored inside or the site would have to register. Under the 2006 Federal Rule, there is no requirement to store intact CRTs destined for recycling inside provided there is no speculative accumulation and no disposal. IDEM already has industrial storm water regulations in place to regulate potential contaminants.

We respectfully request IDEM insert some *de minimus* [*sic. de minimis*] language to allow facilities to store e-waste outside.

Response: The pneumatic equipment would be better recycled as scrap metal and the exclusion at 329 IAC 16-3-1(8) would apply.

Comment: 329 IAC 16-5-1(f) Despite the repeated assertion that this program is much less stringent than applying for a solid waste permit, the proposed language in this section is as detailed as what is required to be submitted to apply for a solid waste processing facility permit (329 IAC 11-9-2). Given IDEM repeatedly stated during the workgroup meetings that "e-waste" facilities currently operating within the state had not caused serious problems, there appears to be no justification for requesting this amount of detail.

We respectfully request IDEM amend this portion of the rule to simply require facilities provide the location of their operations along with a brief narrative description of the types of activities being conducted. (LFR)

Response: IDEM respectfully disagrees that the registration requirements of the proposed rules are as extensive as those for a solid waste processing facility permit. Each facility, simply by operating, would already have the information required for the registration. The department and the regulated community are trying to be proactive and protect the environment and the citizens of Indiana.

IDEM believes that although current facilities have not caused extensive environmental damage, the information required is needed by the department to properly and fairly administer the requirements of the rule and to anticipate additional types of facilities in the state.

Comment: 329 IAC 16-5-1(l) As discussed above, the application process for this program is basically indistinguishable from the programs regulating solid waste permits, and 329 IAC 10 and 329 IAC 11 each contain provisions for the transferability of permits. The only justification IDEM gave during the workgroup meetings for not allowing these permits to be transferred is that IDEM does not charge a fee for the registration. However there are significant costs associated with preparing the application so that argument is not justified based on current conditions and requirements. In every other regulation subject to approval by the Solid Waste Management Board where IDEM maintains the right to deny an application, the transferability of the approval is allowed.

We respectfully request IDEM modify this proposed regulation to allow for transferability. (LFR)

Response: The external rule workgroup for this rule decided to recommend that the registration not be allowed to be transferred. The rule requirements were not seen as sufficiently burdensome to warrant the transfer provision.

Comment: 329 IAC 16-6-1(a) See comments above regarding 329 IAC 16-2-12, 14, and 17 on the overly broad definition of e-waste and 329 IAC 16-3-1 on *de minimis* exclusion for outside storage. IDEM has not documented e-waste poses a threat when stored outside, and the 2006 Federal Rule only requires these stringent storage requirements for broken CRTs based on EPA documentation concerning outside storage of intact and broken CRTs.

We respectfully request some consideration be given to tightening the definition of e-waste to those items actually posing a potential for harm to human health and the environment and allowing the possibility of outside storage for certain types and amounts of e-waste.

Response: IDEM has carefully documented and shared information on the risks of electronic waste with the solid waste management board and the workgroup involved in development of the draft rule. Outdoor storage is already permitted in enclosed containers. The amount excluded is more than 46,000 pounds and there are other temporary storage exclusions.

It is considered open dumping when solid waste is placed on the ground without a permit and is left for more than six months. Storm water requirements also require the use of closed containers for waste.

Comment: 329 IAC 16-6-1(b)(2) The proposed requirement for labeling the date of delivery on newly arrived materials may be possible, but once materials go into process it is possible to have containers that are having material added over an extended period of time. This language does not make it clear whether the date should be when the materials start accumulating, when materials were last added or even every date that materials are added.

We respectfully request the proposed language be modified to clarify what dates must be placed on which containers, with consideration given to the realities of actual facility process activity. (LFR)

Response: IDEM will modify the language. The rule will be modified to require facilities to put the date on the container within 3 days of the container becoming full.

Comment: 329 IAC 16-6-1(c)(2) It is a good business practice to keep track of materials entering and leaving a facility, but the specific list of information proposed in subsections [*sic. clauses*] (A) thru (E) is either too vague or too detailed (sometimes both at the same time) to be useful in making any legitimate regulatory evaluation. The type and amount of “each e-waste” is actually going to change while in the facility depending upon the type of processing. There seems to be no regulatory reason to track where material come from or were generated as specified in subsection [*sic. clause*] (c)(2)©. Given the need to date each container upon recontainment as specified in subsection [*sic. subdivision*] (b)(2), it would be impossible to track the date required in subsection [*sic. clause*] (c)(2)(D). And while it might be possible to track where material in a container awaiting final disposition is going to go as specified in subsection [*sic. clause*](c)(2)(E), the final disposition of new material just arriving on the site would be subject to market conditions well beyond the control of the facility operator.

We respectfully request either this section be eliminated from the proposed rule as subsection [*sic. subdivision*] (c)(1) contains adequate information to demonstrate that speculative accumulation is not occurring, or this section be limited to requiring general business records showing mass balances or incoming and outgoing materials. (LFR)

Response: The rule will be modified to include the change. IDEM agrees that mass balances or tracking of incoming/outgoing material is sufficient. IDEM is working to make the rule clear and simple and appreciates your comments.